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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

REPLY BRIEF OF PETITIONER, WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Of Counsel:

JACK R. CLUCK
HOUGHTON, CLUCK, COUGHLIN, SCHUBAT & RILEY
320 Central Building
Seattle, Washington

RICHARD Q. QUIGLEY
P.O. Box 166
Kennewick, Washington

C. EMERSON DUNCAN, II
1200 Tower Building
Washington, D. C.

JOSEPH H. SHARLITT
1522 K Street, N. W.
Washington, D. C.

NORTHCUTT ELY
ELY AND DUNCAN
1200 Tower Building
Washington, D. C.
Attorneys for Petitioner Washington Public Power Supply System

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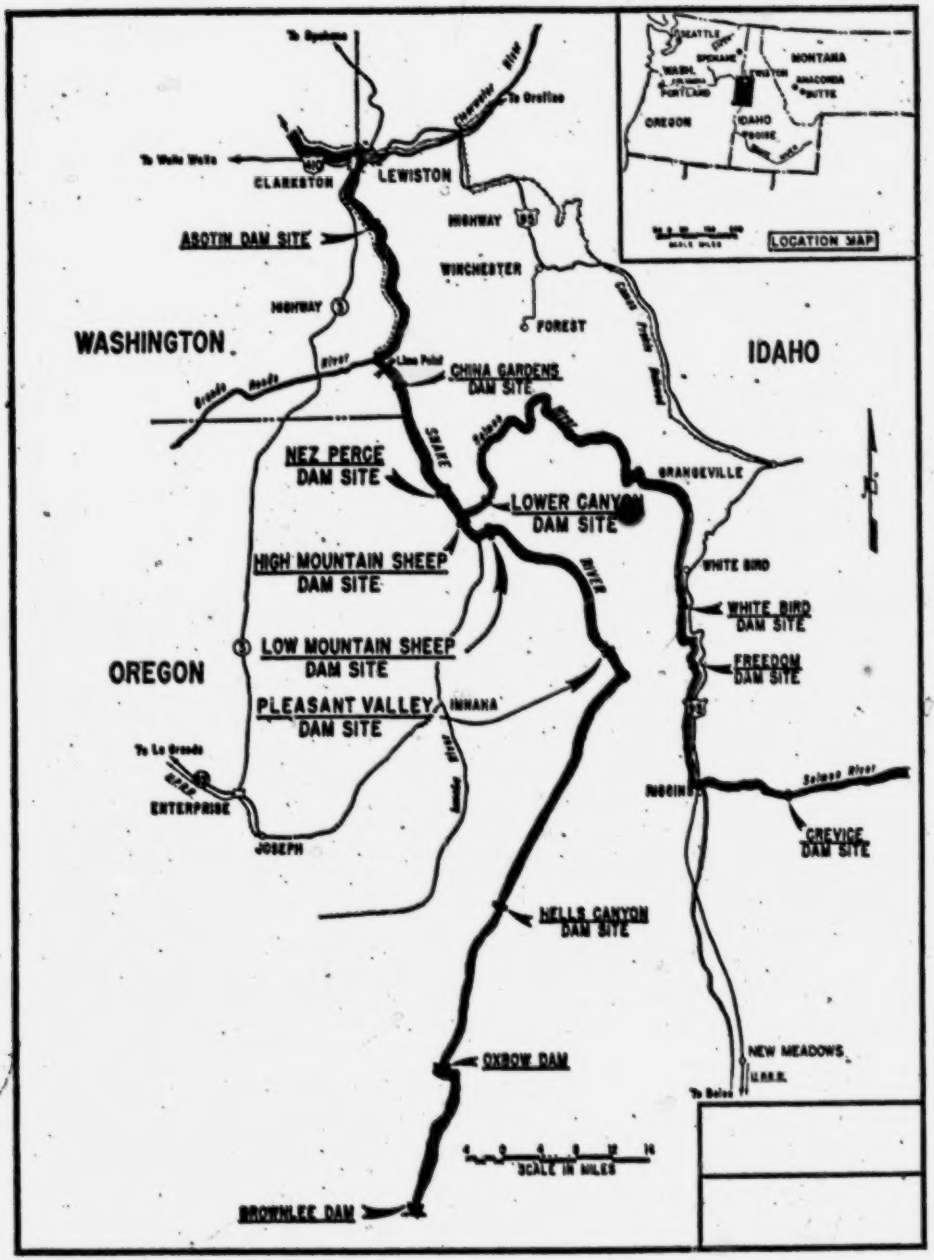

(The Snake River flows north in the area shown on this map.)

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REPLY BRIEF OF PETITIONER, WASHINGTON PUBLIC POWER SUPPLY SYSTEM

It should be noted at the outset that the Solicitor General does not oppose our petition, and we do not oppose his petition on behalf of the Secretary.

As the 147 pages of opposing briefs now make bare, this "benchmark" case marks a historic fork in the road, a choice of interpretations of the Federal Power Act second in importance only to the policy determinations made in the enactment of the Act itself. The issues so disclosed, stated in the framework of the Court's criteria for writs of certiorari, are as follows:

1. *Has the court below decided an important federal question? Manifestly so.* It has denied a license to

a public agency, whose application the Commission ultimately found to present the plan best adapted to the comprehensive development of the waterway, and which was entitled to a mandatory statutory preference to a license.[1] To do this, it has construed the Federal Power Act as empowering the Commission to decide retroactively, in 1965, that the required statutory notice which the Commission had given eleven years earlier to public agencies of its intention to issue a preliminary permit to a power company for a wholly different project elsewhere on the stream, with boundaries deliberately and precisely restricted to exclude

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[1] The Commission's brief is mistaken (pp. 14, 38) in saying that the Commission did not stop with a determination of the priority vs. preference issue, but went on to find the Power Company's over-all plans and qualifications to be superior to Public Power's. To the contrary, the Commission said in its original opinion (Pet., App. B, p. 61a):

> "In the event our decision on priority is adjudged to be erroneous, it would be necessary, under Section 7(a), to give WPPSS a reasonable opportunity to make its plans equally well adapted to those of PNPC and to evaluate such plans following a hearing thereon."

And, at p. 74(a):

> "In the event PNPC is adjudged not to have priority, it might then be necessary to re-evaluate the Secretary's proposal. This would be particularly appropriate respecting WPPSS since its fortunes are so inextricably intertwined with those of the Interior Department."

On rehearing, the Commission reversed its earlier determination that the 875,000 kw. power development proposed by the Company was "best adapted," and found that the 1,200,000 kw. development with larger turbine generators proposed by Public Power was "best adapted," but licensed it to the Company (App. C, pp. 144a, 147a). This is no "detail." Absent Public Power, this resource would now be underdeveloped 30 per cent by the Company's plan.

the site here in controversy,[2] had conferred on that Company, as a matter of law, a priority upon *all* the better project sites outside the permit, to be selected at the Company's option, so long as they "affected" the same "reach". It held that this destroyed the statutory public preference upon the exterior sites, from the 1955 date of issuance of the permit corresponding to that notice (that "wholly false and misleading notice," Chairman Swidler called it)[3] even though no permit was ever thereafter issued upon those excluded sites to anyone.[4] A permit for a site above the confluence of either tributary thus destroyed the public preference on a site which would flood ten miles of the Imnaha, another site which would flood sixty miles of the Salmon River.

Transferring geographically this shocking construction of the law to other streams, a notice of a permit application for a project on the Potomac above its confluence with the Shenandoah would preempt sites below the confluence, flooding both streams; an application for a permit on the American River, not affecting the Sacramento, would preempt sites below the confluence, blocking the Sacramento; notice of a permit application

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[2] "It is dispositive of the whole case that PNPC never sought—indeed, that it deliberately avoided seeking—a preliminary permit for HMS." Chairman Swidler, dissenting (Pet., App. B, p. 111a).

[3] Pet., App. B, p. 114a.

[4] This holding, and this alone, defeated Public Power's preference right to a license for its superior project. The court said (Pet., App. A, p. 5a): "This statutory provision [Sec. 7(a)] undoubtedly gave the Public Power System preference over Pacific Northwest (provided its application met all requirements) if no preliminary permit had been issued." As to "all other requirements," the Commission specifically declined to rule, postponing this to another hearing in the event that its ruling on preference v. priority is overruled. See note 1, *supra*.

on the Cumberland, not affecting the Tennessee, would preempt sites below the confluence which would develop the Tennessee, and so on. These undisclosed alternatives are locked up until the permittee exercises his option, and locked up permanently if he exercises his option to apply for a license *below* the confluence, pursuant to a notice which appropriated only the site *above* the confluence.

This holding deletes from the Act its notice requirements, which are not only essential to the protection of the public preference, Nation-wide, but are indeed jurisdictional. They would become inconsequential if this decision were sustained.

Section 4(f) imposes a condition precedent upon the Commission's power to issue any preliminary permit at all, namely, issuance by the Commission of written notice of the permit application to the states and public agencies likely to be affected.[5] This area can be

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[5] Section 4 makes the issuance of prior notice to public agencies a jurisdictional condition precedent to the Commission's power to issue both licenses and permits. In pertinent part, it reads:

"Sec. 4. The Commission is hereby authorized and empowered—

"(e) To issue licenses . . . *provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

"(f) To issue preliminary permits . . . *Provided, however,* That upon the filing of any application for a preliminary permit . . . the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated."

enlarged by amendment, on like notice (Reg. 4.84); but the Commission has no statutory power whatever to issue a permit which includes a site or area not so encompassed in a statutory notice. The same is true of licenses; section 4(e) requires like notice to public agencies if no preliminary permit has been issued (paralleling exactly the condition stated in section 7(a) for recognition of the public preference). *The scope of the permit application notice is crucial, because the issuance of the permit extinguishes the preference then and there on all projects covered by the permit, and the preference so extinguished cannot be revived in the licensing stage. This is the pivotal importance of the retroactive expansion of the permit given in this case.*

The question is not whether the issuance of a permit puts everyone on notice that the permittee hopes to build a project, and that if he does, this will foreclose development of competing sites outside the permit area (PNPC Br., pp. 22-23). And the question is not whether the municipality learns somehow "what is going on" after the permit issues; it is then too late. The question is whether the Commission's issuance of notice to public agencies of a permit application for a specific site puts them on notice that the permittee is to get *an affirmative priority on all exterior competing sites*, as though the permit had included them, excluding all competitors therefrom and destroying the public agency preference on those undisclosed sites (FPC Br., p. 36). This is a wholly different question.

A permit grants two important privileges to the holder: (a) he gets a priority to a license upon any project within (but only within) its boundaries; (b) the Commission assures him that it will not process an

application for a license on a competing site on the same reach of the stream outside his permit, until he files his own license application (Reg. 4.30). But the permit is a shield, not a sword; it does not grant a *priority* to a license upon competing sites outside his permit's boundaries; to the contrary, if the competing license applicant on the exterior site is a public agency, its statutory preference is unaffected, and must be respected whenever the permit holder gets around to filing his license application on the project which his notice and permit encompassed, and thereupon comes into competition with projects proposed by others for the sites which his permit (and underlying notice) did not encompass.

A permit confers no priority which is lethal to the statutory public-agency preference with respect to sites or areas not disclosed in the notice of the permit application which the statute says the Commission must give public agencies before it can issue a permit. If the statute is now held to mean otherwise, this will be equivalent to new legislation of the first importance.

The record dramatically illustrates this. The notice of permit application actually issued in this case under section 4(f) in 1954 (R. 30006) appears as Appendix A to this brief. We ask the Court to read it. No one can contend that it purported to include High Mountain Sheep. The Commission's decision did not hold that it did. The notice of the Power Company's present license application, issued under section 4(e) in 1959 (R. 25398), appears as Appendix B to this brief. We invite the Court to compare and contrast the two notices. *The issue is the construction of the statute. Did Congress intend that the public preference to a license on the great downstream project*

which was first identified in the 1959 statutory notice of a license application should be destroyed by a notice of a permit application on the inferior upstream sites actually given here in 1954—a "wholly false and misleading notice"[6] *if High Mountain Sheep was then intended to be included?* If so, the notice requirement is henceforth expunged from the statute.

The Commission contends (Br. p. 31, *et seq.*) that simply because the Commission could have issued a broader preliminary permit than the one it actually did issue, no question of statutory construction is involved. This formulation ignores an essential prop of the wholly novel concept of the preliminary permit that the Commission propounds through its decision. It is necessary to give *each* and *every* preliminary permit issued heretofore and hereafter by the Federal Power Commission a vast and unmeasurable extralateral scope *as a matter of law,* if the Commission's present view is to be accepted. Clearly this involves a new view of all preliminary permits, not solely of the one in this case. This extension involves not only the problems of notice to interested public and non-public bodies, but adequacy of notice to federal agencies under statutory mandate to administer other natural resources affected and to report thereon to the Commission.

If, as the Commission now contends, preliminary permits mean far more than they say, the entire statutory scheme under which the Commission has administered section 5, the interested-agency reports under section 4, and the preference under section 7 is completely recast, to the consummate prejudice of

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[6] Chairman Swidler's expression, Pet., App. B, p. 114a.

all future public body applicants and interested federal agencies.[7]

2. *Has the "benchmark question" (Chairman Swidler's expression) of the relationship of section 7(a) (the public preference) and section 5 (the priority protection of permittees) been settled by this Court?* Neither by this Court, nor, until now, by any other court nor by the Commission. Manifestly, it should be settled. If not, if this decision stands, a "deep freeze" of whole river basins is in prospect. On the one hand, the issuance to a power company of a permit to explore any one site defeats the public preference (and gives that company an exclusive priority as against other private power companies, too) on all competitive sites on the stream or its tributaries, without notice to anyone of a claim of priority on those excluded sites. On the other hand, a public agency, knowing henceforth that issuance to a power company of a permit on a site that the public agency does not want will give the company a priority to a license anywhere in the affected river basin on all sites that the public agency is considering, defeating its preference to a license on all of them, must either (1) apply prematurely for a permit itself, to which it has a mandatory preference, or (2) as we are now told by one intervenor, go to Congress for an act withdrawing the whole basin. Did Congress, enacting a statute to promote the comprehensive devel-

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[7] Nothing in In re Montana Power Co., 17 FPC 834 (1957), supports the Commission's contention since the denial of the preliminary permit in that case was caused by the Commission's belief that three other preliminary permits held by the company had *cumulative* scope to permit the preliminary exploration desired by the company.

opment of the Nation's waterways, write this deep-freeze joker into the Act? In the language of Rule 19, this is indeed an important question of federal law which has not been, but should be, settled by this Court. No comprehensive river basin planning by federal or state agencies is possible if no one knows, no one can find out, the outstanding options on alternative sites not disclosed in any permit.

3. *Has the court below "decided a federal question in a way in conflict with applicable decisions of this Court"?* The option upon navigable waterways and public lands now conferred retroactively upon a company which never applied for them—ten years after the issuance to the affected federal, state, and local public agencies of the statutory notice which defined and restricted the Company's claim upon the Nation's public domain so as to exclude the very site here granted, ten years after publication and recording of the notice which deprives subsequent mineral locators and entrymen of all rights to compensation if their lands are flooded by the project—is contrary to everything this Court has said in its historic cases which strictly construe the sovereign's grants.

4. *Does the Hearst rule preclude this Court from reviewing the Commission's novel 3-2 construction of the Federal Power Act?* The problem here is not whether the Commission rightly or wrongly exercised the judgment delegated to it in section 10(a) to select the project best adapted to the comprehensive development of the waterway. It did so when it decided that High Mountain Sheep was the best site, and that the project proposed by Public Power for development of that site (not the 30 per cent smaller project proposed by the Power Company), constituted the

best-adapted project. When the Commission thereupon licensed Public Power's superior project, not to Public Power but to the Company, it misconstrued other sections of the statute which *withhold,* do not confer, discretion. As we have shown, the Commission's whole power to issue preliminary permits is found in section 4(f). Section 4(f) conditions the power to issue the permit upon the issuance of a notice to affected public agencies, describing the project to be encompassed by the proposed permit. The Commission did this, electing to limit and restrict the notice and permit to specific sites.[8] The statutory notice requirement is jurisdictional. The Commission had no statutory authority thereafter to issue an expanded permit, conferring rights on areas not encompassed in the notice, and it never did so. Absent a permit which included High Mountain Sheep, Public Power was entitled to its license on its project, as the lower court conceded.[9] This being so, *a fortiori* there is no statutory authority for a decision, in 1965, which retroactively expands the notice given in 1954, to confer upon a permit a greater geographical scope than the permit said it bestowed.

There is nothing in the rule of *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111 (1944), which protects from judicial review an agency's decision[10] which

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[8] "I do not mean to suggest that the Commission could not grant a permit with a broader scope but it is hard to imagine how a permit could state its limitations any more clearly than was done in the instant case." Chairman Swidler, dissenting, Pet., App. B, p. 112a.

[9] Pet., App. A, p. 5a.

[10] The "swing man" of the 3-2 majority here was not a lawyer. With proper deference to his experience and competence in another profession, these qualifications should not preclude the Court's exercise of its own expertise in construing the statute.

arrogates to the Commission a power which Congress did not confer, indeed withheld.[11]

In *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965), this Court recently said (p. 318):

> "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

In *NLRB* v. *Brown,* 380 U.S. 278 (1965), the Court at the last term, quoting the foregoing passage, applied it (p. 292):

> ". . . where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests . . . ."

and in the same case said (p. 291):

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

5. *Could Oregon and Idaho veto the Commission's selection of Public Power as a licensee?* Oregon and Idaho reassert, *sotto voce,* power to veto the Federal Power Commission's right to select a public agency as a licensee: Oregon because she has licensed the Power Company but not the municipality (Ore. Br. p. 2), Idaho because her statute prohibits a foreign

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[11] The Commission did not cite the Hearst rule, either here or below; neither did the Power Company. Only an intervenor, with a peripheral interest, did so.

municipality from owning a power project in that State, while permitting a foreign company to do so (Idaho Br. p. 14; Idaho Code § 61-327).

The Court has already answered such contentions. *First Iowa Hydro-Electric* v. *FPC*, 328 U.S. 152 (1946), *FPC* v. *Oregon*, 349 U.S. 435 (1955), *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), *Seattle* v. *Beezer*, 376 U.S. 224 (1964).

CONCLUSION

The petitions of Public Power and the Secretary, which the Commission answers jointly and whose cases it called "inextricably intertwined," should both be granted. Only in this way will the Commission, under this Court's guidance, have opportunity to dedicate the tremendous High Mountain Sheep resource to redressing the imbalance in Bonneville Power Administration's resources to meet the onrushing increase in the region's power demands, as portrayed in the Commission's brief. The present partnership of the Washington Public Power Supply System and Bonneville Power Administration in the Hanford atomic energy project, effectuated after the closing of the record in this case, is an example of what can be repeated here for the benefit of the entire region. (P.L. 87-701, Sec. 112) But if the petitions are not granted, the High Mountain Sheep project, the last great storage project on the Snake, will be dedicated to the exclusive benefit of a private power company in response solely to the compulsion of a mistaken interpretation of a statute which Congress intended should produce precisely the opposite effect, and upon a record

whose stale supply and demand forecasts have already proven ludicrously wrong.

Respectfully submitted,

NORTHCUTT ELY
ELY AND DUNCAN
1200 Tower Building
Washington, D. C.
Attorneys for Petitioner
Washington Public Power
Supply System

Of Counsel:

JACK R. CLUCK
HOUGHTON, CLUCK,
COUGHLIN, SCHUBAT &
RILEY
320 Central Building
Seattle, Washington

RICHARD Q. QUIGLEY
P.O. Box 166
Kennewick, Washington

C. EMERSON DUNCAN, II
1200 Tower Building
Washington, D. C.

JOSEPH H. SHARLITT
1522 K Street, N. W.
Washington, D. C.